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THOUGHTS ON THE UNESCO CONVENTION OF 2003 AND EU LAW

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Abstract: The present work tries to analyze what intangible cultural heritage means according to the UNESCO Convention of 2003, what is the intangible heritage, the tools and, the lists that includes and how it is influenced or not the European Union. The UNESCO Convention has not been adopted by the EU system but has since Maastricht and after some elements in communis in the cultural sector in both hard and soft law acts. The future, the type of guardianship, and the protection of intangible culture are some of the topics of our analysis.

Keywords: Intangible Cultural Heritage; UNESCO Convention; European Union; EU cultural policies;

European identity.

INTRODUCTION

Speaking of intangible cultural heritage in the context of the European Union we immediately think of the UNESCO Convention which defined the intangible cultural heritage for the first time on 17 October 2003 and entered into force on 30 April 2006. Art. 2, par. 1 of the UNESCO Convention contains a general definition of intangible culture as:

“(...) the representations, expressions, knowledge, know-how - as well as the tools, objects, artefacts and associated cultural spaces to themselves-that communities, groups and in some cases individuals recognize as part of their cultural heritage (...)”.

This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history and gives them a sense of identity and continuity, thereby promoting respect for cultural diversity and human creativity. For the purposes of this Convention, such intangible cultural

heritage shall be taken into account only to the extent that it is compatible with existing human rights instruments and with the requirements of mutual respect between communities, groups and individuals as well as sustainable development¹.

We continue with art. 2, par. 2 which put a list of non-exhaustive expressions of the intangible cultural heritage as oral expressions, such as the vehicle language of heritage, social uses and customs, rituals and festivities and knowledge relating to nature and the universe, concluding with traditional craftsmanship. The UNESCO Convention includes cultural heritage as an objective element, a community of people, i.e. a social element that lives and acts in a cultural context (Lixinski, 2013; Golinelli, 2014; Scovazzi, 2019). These are the elements that are included in the Lists that are provided for by the Convention that represents the intangible cultural heritage (Representative List of the Intangible Cultural Heritage of Humanity), as well as the list that includes the intangible heritage that needs protection of an urgent nature (List of Intangible Cultural Heritage in Need of Urgent Safeguarding).

¹<https://ich.unesco.org/en/home>

Object of the UNESCO Convention is to be used as an international instrument with the European policies on culture. Among the UNESCO qualifications we mention the intangible cultural heritage and the object of European cultural policies. The UNESCO Convention, however, does not cover intellectual property rights that have specific protection under national law as well as international rules and the law of the Union but mostly works within the context of the WIPO/WIPO.

Within this context of the Union we also remember the rules concerning the protection of linguistic diversity (Mayer, Palmowski, 2004; Arzoz, 2008). The official languages of the Union have equal legal status in the European area and constitute identical and fundamental elements of the Union. The languages according to the UNESCO Convention are protected within the intangible heritage and are used as a vehicle of the heritage according to art. 2, par. 2. The European Union as protector of plurilingualism has formed legal acts that offer protection to the languages of European countries and to their institutions, to the spoken language and, the interpretation and translation of the acts especially in criminal

proceedings which are up to all citizens of the Union and not to the members of each particular community (De Witte, 2018).

Religion does not enter in the context of the UNESCO Convention, however it detects in its context theological and moral aspects and also rituals with dances, etc. The preamble of the TEU states that:

“(...) the contracting states are inspired by the cultural, religious and humanistic heritages from which the universal values of democracy, human rights and the rule of law originate (...)”.

Within this spirit we recall Art. 17 TFEU (Blanke, Mangiamelli, 2021). It refers to obligations of a legal nature towards religious denominations. The religious element as a protection per se in European law is part of the extended family of common identity without requiring other objective and subjective elements that are required by the UNESCO Convention. They are examples that justify European initiatives that lead back to immateriality but do not respond to the characteristics of immateriality according to the spirit of the UNESCO Convention, i.e. to practices, communities of people, and the space of

components.

In conclusion, by intangible culture we mean the set of natural conditions, modified and used by man as his own activity and also with his own work. Culture means not going against one's human nature because it offers the possibility for a system to change its unchangeable and untamed nature. The safeguarding of the cultural heritage cannot be functional within a static environment but only by using an aesthetic conception of the cultural asset which uses means and knowledge compatible with a vision which responds to the principles of each member of the EU. The enhancement of a cultural heritage serves to guarantee to all citizens the improvement of the quality of life, the development, the related protection and conservation measures in the cultural heritage sector of each member country of the EU. The protection of the intangible culture of a country does not only mean conservation or control of the circulation of objects of art and history but also the protection of the latter and of the contemporary nature of a people.

INDIRECT INFLUENCE OF THE UNESCO CONVENTION ON EU LAW

First of all we can say that the UNESCO Convention of 2003 was not adhered to by the EU since only some and not all Member States of the EU² participated in its conclusion. However, EU and its Member States have taken into consideration the UNESCO Convention of 2005 regarding the protection and promotion of the diversity of cultural expressions that allow membership in regional and economic integration organizations (Ferri, 2005; Von Schorlemer, Stoll, 2012)³.

EU have, however, adhered to the UN Convention on the rights of persons with disabilities which is part of the legal system of the Union and the related provisions relating to access to culture⁴. The UNESCO Convention, thus, remains

²Currently 180 states adhere to the UNESCO Convention. The UK has never joined it.

³2006/515/EC: Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, OJ L 201, 25.7.2006, p. 15–30.

⁴Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23, 27.1.2010, p. 35–36.

outside the law of the Union and does not include suitable measures to adopt its implementation as happens to the other treaties just referred to⁵.

However, there is a general European discipline of identification which includes the elements of the intangible cultural heritage such as for example Art. 2, par. 3 and Art.11, par. 1, letter b) of the UNESCO Convention to the related states that adhere⁶. In particular, we mean of the general policy planning programs that are promoted by the UNESCO Convention, and the scientific, technical and artistic research arriving to specialized training that concerns education, awareness and information, actions that inform the public about dangers that threaten cultural heritage and the protection of natural spaces and places of memory (art. 14), as well as participation in groups of individuals that protect the UNESCO Convention⁷ and the

⁵See art. 2, par. 1 of the UNESCO Convention.

⁶See Art. 11: “Each contracting state: (...) b) among the safeguard measures referred to in article 2, paragraph 3, shall identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, relevant non-governmental organizations and groups (...)”.

⁷Article 15, Participation of communities, groups and individuals: “In the

promotion of international cooperation in the specific sector.

In overall, the UNESCO Convention indirectly influences the EU and thus establishes the works of international law, i.e. the instruments of accession. It is a tendency to refer to national legal systems that identify the object and contents of cultural policies. The UNESCO Convention lends indirect influence and responds to the exercise of sovereign powers, giving trans-state value to the elements that characterize the intangible heritage in the sense of identity, presenting them as custodian communities that continue to transmit a particular cultural asset to future generations, distinguishing it from the rest of the world. A community that identifies itself as an entity other than government bodies, social and religious groups, of ethnic or linguistic origin, etc. (Dolff-Bonekämper, 2009; Adell, Bendix, Bortolotto, Tauschek, 2015)⁸. An element that coincides with

context of its activities to safeguard the intangible cultural heritage, each contracting state shall make every effort to ensure the widest possible participation of communities, groups and, where appropriate, individuals who create, maintain and transmit this cultural heritage, in order to actively involve them in its management”.

⁸Council of Europe, Steering Committee for Cultural Heritage and

the founding objectives of the treaties of the Union, according to the principle of promoting cultural diversity, the European policies that enter national borders and the intermediate bodies that directly touch local realities, thus assuming a co-essential path to building a common European identity.

THE FRAMEWORK OF EUROPEAN POLICIES IN THE CULTURAL SECTOR

The European cultural dimension includes a common framework which respects the culture and tradition of each people. According to the preamble of the TEU, this dimension is based on the cultural, religious and humanistic heritages of Europe, from which the universal values of the inviolable and inalienable rights of the person, such as freedom, democracy, equality and the state of right. This dimension intensify solidarity among their peoples while respecting their history, culture and traditions. Art. 3, par. 3, last sentence, of TEU states that the Union:

Landscape CDPATEP, Some Pointers to Help Understand the Faro Convention, Strasbourg, 20 April 2009.

“(...) respects the richness of its cultural and linguistic diversity and supervises the safeguarding and development of European cultural heritage (...)” (Zagato, 2015)⁹.

As far as its powers are concerned, the Union does not have an exclusive, concurrent competence in the cultural sector but acts as a support, coordination and completion of an action of the Member States pursuant to Art. 6, par. 1, lit. c) TFEU and to Art. 167 TFEU (Blanke, Mangiamelli, 2021). Both the national diversity and the common European framework are already present in the Maastricht treaty which first introduced the competences in the cultural sector. This is a mosaic of cultures where their own regional and local diversities constitute a substratum of a common culture. European policies have taken flesh and blood through main instruments, i.e. hard law in the field of Union law, in the intra and extra market of the EU, to material cultural assets connected with the free movement

⁹“(...) people who can move cross-culturally and through territories, social groups, in time (as a consequence the same individuals may belong, contemporarily or in a sequence, to more than one heritage community) (...)”. The fluid, to some extent neo nomadic, are profiles of European citizenship.

of goods¹⁰, the free movement of services, the directives on audiovisual media services of 2018 (Schütze, Tridimas, 2018; Craig, De Búrca, 2020)¹¹, copyright in the digital market¹², the incidents on the immaterial dimension in a broad sense through the structural funds on investments and culture programs according to Creative Europe 2014-2020, pre-existing programs refinancing the 2021-2027 period

¹⁰Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 74, 27.3.1993, p. 74–79. Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast), OJ L 159, 28.5.2014, p. 1–10. Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods (Codified version), OJ L 39, 10.2.2009, p. 1–7.

¹¹Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, PE/33/2018/REV/1, OJ L 303, 28.11.2018, p. 69–92.

¹²Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.), PE/51/2019/REV/1, OJ L 130, 17.5.2019, p. 92–125.

through state aid framework allowing for supervision, commission control, public support, activities and the protection of cultural heritage (Ferri, 2015; Blanke, Mangiamelli, 2021)¹³.

Both the hard law acts and the investments in culture of the structural funds and programs constitute sub-objectives of multi-annual policies which are articulated in acts and phases which include various levels of government. In 2007 we recall the European Agenda for Culture as a planning intervention in the cultural sector¹⁴. European policies take the form of multi-annual work plans which are adopted by the Council of Ministers in the form of conclusions. In the same context we recall the multi-year plans: 2008-2010, 2011-2014, 2015-2018 and 2019-2022¹⁵. Since 2007 the open method of coordination as a form of collaboration of a voluntary nature between states controls and coordinates

¹³Art. 107, par. 3, lett. d), TFUE.

¹⁴COM(2007)242-Communication European agenda for culture in a globalizing world of 16 November 2007.

¹⁵Work Plan for Culture 2023- 2026: Informal meeting of the Committee on Cultural Affairs of the Council, 31 May 2022:
www.ietm.org/en/advocacy/policy-papers/policy-statement-recommendation-for-the-work-plan-for-culture-2023-2026

(between Commission and groups of experts) the practices that seek to issue non-binding recommendations. European cultural policies of 2014, 2018 and 2020 show the centrality of a culture of growth, employment and development, as a vehicle for recovery from the economic crisis¹⁶. The objectives of 2014 continue also for the next years. In 2018, (the European Year of Cultural Heritage through planning and coordination measures) they frame an objective of communicative power involving the European Commission and a group of national coordinators who collaborate with international organizations such as UNESCO, the Council of Europe and the networks of associations¹⁷. The stability of a

¹⁶Council conclusions of 21 May 2014 on cultural heritage as a strategic resource for a sustainable Europe, OJ C 183, 14.6.2014, p. 36–38. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee and the Committee of the Regions. Towards an integrated approach to cultural heritage for Europe, COM/2014/0477 final. Commission Recommendation (EU) 2021/1970 of 10 November 2021 on a common European data space for cultural heritage, C/2021/7953. OJ L 401, 12.11.2021, p. 5–16.

¹⁷Decision (EU) 2017/864 of the European Parliament and of the Council of 17 May 2017 on a European Year of Cultural Heritage (2018), OJ L 131, 20.5.2017, p. 1–9.

European intervention in the field of cultural policies such as the Agenda for Culture of the Commission reflects the work plan of 2019-2022¹⁸. The promotional principle of cultural diversity with a mainstreaming character is envisaged in par. 4 of Art. 167 TFEU¹⁹. The cultural sector adopts unknown forms for resources that fall to cultural heritage as happens in the Creative Europe program that acts as an incentive to digitization that transfers investment tools²⁰.

¹⁸Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and Social Committee and the Committee of the Regions. A New European Agenda for Culture. COM/2018/267 final.

¹⁹COUNCIL Council conclusions of 26 November 2012 on literacy (2012/C 393/01) European Commission, Directorate-General for Education, Youth, Sport and Culture, European framework for action on cultural heritage. Publications Office, 2019, <https://data.europa.eu/doi/10.2766/622226>

²⁰Commission Recommendation (EU) 2021/1970 of 10 November 2021 on a common European data space for cultural heritage, C/2021/7953. OJ L 401, 12.11.2021, p. 5-16. Digital Europe Program (DIGITAL), a new funding program part of the Multiannual Financial Framework 2021-2027; Horizon Europe, where the Pillar II Global Challenges and European Industrial Competitiveness includes the Cluster Culture, Creativity and Inclusive Society. REACT-EU, Public services line, including tourism and culture assets. the Technical Support Instrument, a new program to provide States

INTANGIBLE HERITAGE AND POLICIES OF THE UNION

According to the UNESCO Convention, intangible heritage is a component of the European governance of cultural heritage which offers a perspective that focuses on the guidelines of the European institutions. Already since 2014 the Council and the European Commission have followed a path of cultural heritage which according to the UNESCO Convention cultural heritage consists of the resources inherited from the past, in all forms and aspects-material, immaterial and digital (originally produced in digital or digitized format), including monuments, sites, landscapes, skills, practices, knowledge and expressions of human creativity, as well as collections conserved and managed by public and private bodies such as museums, libraries and, archives. It originates in the interaction between people

with technical skills to design and implement reforms to mitigate the post-covid-19 economic and social consequences as part of the recovery and resilience mechanism finally. Recovery and Resilience Facility, in its 6 pillars, Green Transition, Digital Transformation, Smart, sustainable and inclusive Growth, Social and territorial cohesion, Health, and economic, social and institutional resilience, Policies for next generation.

and places and is constantly evolving due to skills, practices, knowledge, expressions of human creativity, and to some aspects of the Council of Europe Framework Convention on the Value of Cultural Heritage for society, Faro Convention²¹, but also for “resources inherited from the past” (art. 2, par. 1)²².

Within this context, a reference formulation of the recognition of a community of groups that have digital autonomy to dematerialize goods and to produce intangible goods with an autonomously existing way, is missing, i.e. a digitization that represents an objective that dominates European policies for culture, with the aim of promoting cultural diversity and increasing accessibility²³. Tools that

²¹<https://www.coe.int/en/web/culture-and-heritage/faro-convention>

²²According to Art. 2 of the Faro Convention: “(...) cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time (...)”.

²³Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Agenda for Europe, COM/2010/0245 final. Commission Recommendation of 27 October 2011 on the digitisation and

go back, cover aspects in intangible heritage through the European Capitals of Culture initiative, to 1985. The European Award for Literary Translation and Support which was established in 2008, Creative Europe funding of cultural lines and media 2014-2022 and media and cross sectoral 2021-2027, the music moves Europe talent awards from 2019. From 2017 we think of an indicator that completes the European Commission through the Cultural and Creative Cities Monitor which offers data to support public policies in matters of culture. It is an analysis of data from different indices that includes data on the economy of culture and the intangible cultural dimension such as the number of theatres, cinema, live performance, exhibitions and audience participation²⁴. Intangible culture in European policies in the general sense and the initiatives that are connected with intangible assets such as theatre, literature,

online accessibility of cultural material and digital preservation (2011/711/EU). Commission Expert Group on the common European Data Space for Cultural Heritage (CEDCHE), with the participation of UNESCO: <https://digital-strategy.ec.europa.eu/en/news/expert-group-common-european-data-space-cultural-heritage>

²⁴<https://composite-indicators.jrc.ec.europa.eu/cultural-creative-cities-monitor>

audiovisual cinema, extend across the European space emerging a dimension of identity of a common nature.

The UNESCO Convention comes as a sub-component of European cultural heritage recalling also the Recommendation on the common European area for cultural heritage adopting the related digitization which started in 2011²⁵. The recall of intangible heritage in the related recommendation is not, however, so precise. UNESCO addresses to the Member States an identification obligation of the elements upon accession to the same convention. Without ad hoc indications, we proceed with the digitization of elements for the cultural heritage components as per the European standards, the digital public library where the data converge to a certain availability that observes the results of the work of the recommendation by the group of experts who establish an implementation at national state level. This is a formative

²⁵Commission Recommendation (EU) 2021/1970 of 10 November 2021 on a common European data space for cultural heritage, C/2021/7953, OJ L 401, 12.11.2021, p. 5-16. Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, OJ L 283, 29.10.2011, p. 39-45.

orientation from UNESCO, seen as an act for the European institutions, autonomously and definitively in the dimension of immateriality to a mechanism that indirectly influences European policies.

CULTURAL HERITAGE AND PARTICIPATORY MANAGEMENT

As we have predicted, the UNESCO Convention has recognized the groups, the community, the individuals who play a decisive role in the production, safeguard, conservation, transmission and recreation of the intangible cultural heritage in the management of intangible elements in the national territories according to article 11, par. 1, lit. b). We do not have an exact answer from the same UNESCO Convention on what is meant by community (Zagato, 2015; Xu, Allain, 2016). There is an indeterminacy of the concept for indigenous peoples, minorities, often oral heritage, the deforestation, drought, emigration of commercial exploitation and the community at large. These are “elements” that are registered in the relevant Lists that refer to the national community, the practices of the

Chinese cultural tradition and the transversal community of states as for example in the case of the Mediterranean diet. The requesting state must show that the application for inclusion in the List has given prior, free and informative consent, as well as for the List for safeguard measures. The UNESCO Convention connects with the right of the Union with a participation where the nature of the intangible asset survives, transmits and needs its recreation even if the community no longer exists and the practice is lost.

A cultural governance²⁶ that is part of an intense trend that is linked to a participatory one is appeared on the European agenda since the early 2000s. The organization of the Union does not pertain to individual initiatives but to the implementation of policies where in other sectors this element has no consistency. As early as 2012, the Council stated that:

“(...) cultural governance (...) is a method for implementing cultural policies (...) a tool for deepening the integration of culture into the public policy agenda through the coordination of cultural policies with other

²⁶See also in argument:

<https://www.interarts.net/descargas/interarts2549.pdf>

sectoral policies (...). Governance pertains to the planning and execution of policies (...)”²⁷.

The Council from 2014 and on has been oriented towards an address that expresses the participatory governance of the cultural heritage where the object controls heritage elements towards an elaboration of policies where in any way they are expressed through individual heritage elements, regulatory deeds of direction, planning and programming. A group of experts has been collecting and examining national participatory practices in the context of the WTO since 2018 (Jakubowski, Hausler, Fiorentini, 2019; UNESCO, 2021)²⁸. Participatory processes examine the components of European cultural heritage in digital form as

²⁷Council conclusions of 26 November 2012 on literacy (2012/C 393/01): <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:393:0001:0004:EN:PDF>

²⁸Participatory governance of cultural heritage, Report of the OMC working group of Member States’ experts, 2018. Report Policies and good practices in the public arts and in cultural institutions to promote better access to and wider participation in culture, drawn up by Open method of coordination (OMC) working group of EU Member States’ experts on better access to and wider participation in culture (October 2012): https://ec.europa.eu/assets/eac/culture/policy/strategic-framework/documents/omc-report-access-to-culture_en.pdf

elements of levels of governance involving acts of national planning, urban plans, interventions on individual assets and sites. No problem for the single plan that applies to a specific community and requires a participatory method invitation to the correct identification of stakeholders to the effectiveness of the method of co-programming purposes that is responsible for diversity and respects the circumstances that make up society.

Participatory governance as part of the intangible heritage recognizes an approach to the UNESCO Convention, which is part of other conventions, to a convergence of problems of participatory processes that are related to the level of interaction, the modalities and the limits of the participatory forms. The experiences integrate and increase the candidacies of the Lists of the UNESCO Convention which constitute a large mosaic of reasoning for the participation of the purposes of the European guidelines. European participation maintains an autonomy that goes back to a path that puts the democratic principle as effective to an aspiration that wants to encourage a reality that reflects a broad and precise system also for the near future.

CONCLUDING REMARKS

The UNESCO Convention is now an evolutionary reality of integration and growth of the EU law where they are compared to guidelines and analysis of a complex framework of European cultural policies. An approach within existing processes where the protection and enhancement of the immaterial dimension is seen as a component of a European cultural heritage where digitization, the favor for participatory governance adopts and develops this type of policy. By identifying the acquisitions of the UNESCO Convention within the spirit of European cultural policies, it safeguards the need for a broader and more specific framework in the objectives they are aimed at.

We can say that the UNESCO Convention differs from a level of human rights protection where the intangible cultural heritage is identified and the so-called convention respects human rights and identifies an intangible heritage, as a limit for the recognition of the objectives of the agreement according to art. 2, par. 2. Human rights, democracy and, the rule of law represent a European

cultural heritage that identifies, reflects and transmits the principles and elements of the European cultural heritage (Zagato, 2015).

Cultural heritage through the UNESCO Convention:

“(...) is constantly recreated by communities and groups, their interaction with nature and their history gives them a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity (...)” (Zagato, 2015).

Cultural heritage is expressed as a community circumscribed by an identity that plays on various levels. On the local level of the single community involved and on a general level of construction belonging to the European municipality. These are two tracks that present a European cultural dimension where the level of identification protects and promotes diversity very close to the spirit, ideology and content of the UNESCO Convention as a typical identity of the European legal dimension where individual interventions touch the space and the community always to an explicit ulterior purpose giving it a character that differentiates the European legal experience for the foreseeable future.

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